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No. 83-1193

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

FRANK A. FORD, ETC., et al.,
Appellants,

v.

DEPARTMENT OF REVENUE, STATE OF FLORIDA ETC., et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION TO DISMISS OR AFFIRM AND APPENDIX

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MOTION TO DISMISS OR AFFIRM

Appellees respectfully move the Court to dismiss this appeal or to affirm the judgment of the Supreme Court of Florida on the following grounds:

I. Appellants' federal constitutional objection to Section 194.192(2), Florida Statutes, was not presented timely or adequately to the Supreme Court of Florida.

II. Appellants waived their objections to Section 194.192(2), Florida Statutes, by voluntarily submitting themselves to its terms and conditions.

III. Appellants lack standing to complain that all subsurface rights are not separately

assessed in other Florida counties.

IV. The judgment of the Florida Supreme Court rests on an adequate non-federal basis.

V. The appeal does not present a substantial federal question.

STATEMENT

Appellants are owners of separated oil, gas, mineral and other subsurface rights in Volusia County, Florida. In the consolidated cases below, they objected to separate assessment of their separately-owned subsurface rights by the Volusia County Property Appraiser. Such separate assessment of separately-owned surface and subsurface rights is required by Section 193.481, Florida Statutes. (App. 81a)[1]

After a non-jury trial, the Circuit Court for Volusia County, Florida, adjudged that the subject assessments were

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[1]The following abbreviations are used:

"App" for Appendix to Jurisdictional Statement.

"MD-App" for Appendix to Motion to Dismiss or Affirm.

lawful and correct in all respects. (App. 55a) The court entered personal judgments against the taxpayers for the unpaid taxes and interest found to be due and payable, in accordance with Section 194.192, Florida Statutes. On rehearing in the trial court and later on rehearing in the Supreme Court of Florida, the appellants complained that the personal judgment provision of Section 194.192 violates the court access provision of the Florida Constitution.

Appellants claimed in the trial court that they are victims of discriminatory enforcement of the subsurface rights statute because property appraisers in some other Florida counties are not diligently identifying and separately assessing separately-owned subsurface rights. For that and numerous other

reasons they prayed that the collection of their own assessments be enjoined. (MD-App. 1) Appellants did not pray for the enforcement of the statute in other counties.[2] (MD-App. 1)

Although the trial court refused to cancel appellants' assessments, it declared that its judicial conscience was shocked by the evidence of the lack of diligent enforcement of the subsurface rights statute in other counties. (App. 51a) The trial court therefore ordered the Florida Department of Revenue to take appropriate action to enforce Section 193.481, Florida Statutes, in

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[2]Appellants' claims are in the nature of private, individual taxpayer actions, brought for the purpose of cancelling their own taxes. They are not taxpayer class actions brought to protect the rights of other taxpayers or the public interest.

other counties, despite the fact that such relief had not been requested by any party. (App. 55a)

On appeal, the Fifth District Court of Appeal of Florida reversed the final judgment. (App. 12a) The district court ruled that the statute had been unconstitutionally applied to the appellants and it therefore ordered the trial court to cancel appellants' taxes.[3] (App. 31a-32a) The district court also reversed the trial court's order directing the Department of Revenue to take action to enforce the statute, because that relief was outside the pleadings

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[3]The district court merely declared that the statute had been "unconstitutionally applied" without identifying any specific constitution or constitutional provision. (App. 31a) The ruling does not appear to be based on federal grounds because no federal authorities are cited in the opinion.

and had not been prayed for. (App. 30a-31a)

The Supreme Court of Florida confirmed the trial court's finding that the appellants' assessments are lawful and valid. (App. 9a) The Court pointed out that the appellants had suffered no financial detriment whatsoever by the lack of separate assessment of separately-owned subsurface rights elsewhere because that merely means that the entire value of the parcel is assessed against the surface owner. (App. 10a) The Court also rejected the appellants' argument that their valid tax assessments should be cancelled on account of assessment errors in other counties. (App.3a-4a) Accordingly, the Supreme Court quashed the district court decision insofar as it ordered the trial court to cancel

appellants' assessments. (App. 10a) The Court approved that portion of the district court decision which reversed the trial court's order directing the Department to take action to enforce the statute. (App. 10a) The Court declared that the mandatory provisions of the subsurface rights statute must be implemented but held that that must be done without retention of jurisdiction by the trial court. (App. 10a)

In the trial court, appellants called property appraisers or their assistants from 7 Florida counties, whose testimony revealed less than diligent efforts in those counties to search land title records to identify and separately assess separately-owned subsurface rights.[4]

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[4]The 7 counties are within the St. Johns River Water Management District, a 19-county multi-county taxing district

-Footnote Continued-

(MD-App. 2 et seq.) However, the testimony of those taxing officers generally revealed a willingness to separately-assess such interests when requested to do so by either surface or subsurface owners or when such interests came to their attention by current conveyances or otherwise. (MD-App. 6, 10, 13-14, 17) The testimony also revealed that very few requests for separate assessment are received from either surface or subsurface owners. The testimony did not reveal a refusal by any taxing officer to separately assess separately-owned subsurface rights when requested to do

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Footnote Continued

[4]which also includes Volusia County. Section 373.069(2)(c), Florida Statutes. The entire State of Florida is subdivided into 67 counties. Chapter 7, Florida Statutes.

so.[5]

The evidence merely revealed a lack of diligence in separately assessing subsurface rights in some counties, and an improper inclusion of the value of such rights in a single assessment of the entire fee. The evidence did not reveal any ommission or systematic under-evaluation of property.[6]

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[5]The Marion County Property Appraiser testified that he had received requests or returns on about 4 parcels of mineral rights but had not separately assessed them upon checking them out and finding that they conflicted with the cleared titles in a large subdivision. (MD-App. 8-9)

[6]Appellants' complaint is that some separately-owned subsurface rights in some other counties are not assessed separately. As appellants stated in their motion for rehearing in the Supreme Court of Florida, "The question of comparative inequality of assessed values is not even involved . . . . " (Emphasis in original.) (App. 65a)

ARGUMENT

I.

Appellants' federal constitutional objection to Section 194.192(2), Florida Statutes, was not presented timely or adequately to the Supreme Court of Florida.

Appellants contend here that Section 194.192(2), Florida Statutes, (App. 85a) which provides for entry of a personal judgment against taxpayer litigants in the amount of the taxes adjudged to be due plus interest, violates the equal protection clause of the 14th Amendment of the United States Constitution.

The Supreme Court of Florida did not consider the statute nor did it mention it in its decision. (App. 1a)

Appellants objected to the statute in the Supreme Court of Florida for the first time in their motion for

rehearing.[7] (App. 61a) Moreover, their objection was based on State grounds, not federal grounds. They argued that the statute violates Article I, Section 21 of the Florida Constitution, which guarantees access to Florida courts. (App. 62a-64a) Although appellants used the

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[7]Appellants fail to offer any credible excuse for their failure to present their objection to the Supreme Court of Florida prior to rehearing. They cannot claim that they did not have an opportunity to raise the objection earlier or that the objection arose in the Supreme Court decision itself and took them by surprise. The personal judgment to which they object was entered by the trial court on November 18, 1980, (App. 33a) almost three years before the Florida Supreme Court filed its decision on September 8, 1983. (App. 1a)

In the Supreme Court of Florida, appellants asserted numerous arguments in opposition to the trial court's judgment and in support of the district court's decision. Nothing disabled them from asserting their personal judgment objection and their neglect to do so is a waiver under Florida law. Nelson v. Seldon Cypress Door Co., 78 Fla. 203, 83 So.286 (1919).

expression "denial of equal protection", they did so in their argument based on the Florida Constitution. (App. 63a) They did not mention the United States Constitution or any federal authorities whatsoever. The Florida Supreme Court denied rehearing without opinion.[8] (App. 59a)

Assuming arguendo that appellants asserted their federal objection to the statute in their motion for rehearing, their objection was untimely. Under Florida appellate procedure, questions cannot be raised for the first time on

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[8]Appellants virtually concede this issue. They acknowledge that "Standing alone the assertion of the Motion for Rehearing might not be a sufficient preservation of Fourteenth Amendment arguments . . . ." They also concede that "their preservation of federal question number I on the Petition for Rehearing may be minimal . . . ." (Jurisdictional Statement, p. 10)

rehearing. Nelson v. Seldon Cypress Door Co., 78 Fla. 203, 83 So.286 (1919); Cartee v. Fla. Dept. of H. & R. Services, 354 So.2d 81, 83 (Fla. 1st DCA 1978). Questions presented to the highest State court for the first time on rehearing also come too late for consideration by this Court. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945); Hanson V. Denckla, 357 U.S. 235 (1958). See Beck v. Washington, 369 U.S. 541 (1962). See also Justice Blackmun's concurring opinion in Estate of Wilson v. Aiken Industries, Inc., 439 U.S. 877 (1978).[9]

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[9] "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1945).

The Florida Supreme Court decided no question concerning Section 194.192(2), Florida Statutes. This Court's consideration of the statute would necessarily be advisory and original, not appellate, in nature.

II.

Appellants waived their objections to Section 194.192 (2), Florida Statutes, by voluntarily submitting themselves to its terms and conditions.

A Florida taxpayer may obtain judicial review of a disputed ad valorem tax by either of two methods. He may file an action to contest the tax after paying only the amount which he admits in good faith to be owing, as prescribed by Section 194.171(3), Florida Statutes. (App. 83a-84a) If the court finds that the amount of the tax owed by the taxpayer

is greater than the amount the taxpayer has admitted and paid, the court is required by Section 194.192(2), Florida Statutes, to enter a personal judgment against the taxpayer for the deficiency plus interest. (App. 85a)

As an alternative to such a deficiency action, the taxpayer has the option of paying the entire tax under protest and filing suit for a refund of the amount of the tax in dispute. Willig v. Blake, 358 So.2d 871 (Fla. 3d DCA 1978); Smith v. University Presbyterian Homes, Inc., 390 So.2d 70 (Fla. 2d DCA 1980), approved in Presbyterian Homes, Inc. v. Smith, 408 So.2d 1039 (Fla. 1982). Thus, the Florida taxpayer who objects to the entry of a personal deficiency judgment against him pursuant to Section 194.192(2), may avoid the statute by exercising his option to

file a refund action. However, if the taxpayer prefers to obtain the substantial advantage of paying only that portion of the tax which he admits in good faith to be owing and deferring payment of the balance due until the end of the litigation, he must accept the statutory condition that a personal judgment will be entered against him for any adjudicated deficiency.

In Rosewell v. LaSalle National Bank, 450 U.S. 504 (1981), this Court held that the sole judicial remedy afforded to Illinois ad valorem taxpayers, of paying the tax in full and filing suit for a refund without interest, constitutes a "plain, speedy and efficient remedy" under 28 U.S.C. §1341, the Tax Injunction Act. It necessarily follows that the Florida Legislature was not obliged to

supplement the Florida taxpayer's refund action with the optional deficiency action prescribed in Section 194.171, Florida Statutes. (App. 83a) Nor can the Legislature be faulted for granting that optional means of judicial review on the reasonable and prudent condition that a personal deficiency judgment be entered against the taxpayer in the amount adjudged to be due.[10] Taxes are obligations of the highest character and only as they are

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[10] "It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity of themselves, give the right to an injunction in a court of equity." State Railroad Tax Cases, 92 U.S. 575, 613 (1875).

The simple philosophy derived from the experience of ages is that "the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment." State Railroad Tax Cases, 92 U.S. 575, 613 (1875).

discharged is the continued existence of government possible. Florida C. & P. R. Co. v. Reynolds, 183 U.S. 471 (1902).

III.

Appellants lack standing to complain that all subsurface rights are not separately assessed in other Florida counties.

The Florida subsurface rights statute, Section 193.481, Florida Statutes (App. 81a) provides that separately-owned subsurface rights shall be separately assessed and taxed. That is, instead of combining all interests in the land in a single assessment, the interests of the surface owner and the subsurface owner should be assessed and taxed separately. Subsection (3) provides that the combined assessed values of the surface and subsurface interests shall not exceed the

full just value of the entire parcel of land.[11]

As the trial court declared, (App. 36a) the purpose of the statute is to achieve tax equity between the surface owner and the owner of separated subsurface rights. Straughn v. Sun Oil Co., 345 So.2d 1062 (Fla. 1977); Dickinson v. Davis, 224 So.2d 262, 265 (Fla. 1969).

If a Florida Property Appraiser fails to identify and separately assess a separately-owned subsurface interest, and instead includes the value of the entire fee in a single assessment, the injured party is the surface owner in whose name

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[11]Separate assessment of separately-owned subsurface rights is an exception to the general rule in Florida that the assessment of each parcel of land must include all interests in the property. Homer v. Dadeland Shopping Center, Inc., 229 So.2d 834, 837 (Fla. 1970).

the property is assessed. He is injured because he pays the subsurface owner's tax as well as his own. Other taxpayers, such as the appellants here, suffer no damage or detriment whatsoever. As the Supreme Court of Florida correctly observed in its opinion in this case: (App. 10a)

> "We point out that the property owners suffer no financial detriment whatsoever by virtue of any lack of such separate assessments elsewhere. The lack of such separate assessments merely means that the entire just value is assessed against the surface owner."

Injury sustained by surface owners does not give the appellant subsurface owners standing to complain. The plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties. Warth v. Seldin, 422 U.S. 490, 499 (1975). Constitutional rights are personal and may not be asserted

vicariously. Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973). Any surface owners who sustain injury on account of such assessment errors are not disabled from asserting their own rights.[12]

Appellants' claim here is fundamentally different from that of a taxpayer who complains of other properties which are systematically underassessed or omitted from the tax roll. Under such circumstances,

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[12] If such an assessment error is brought to the attention of the Property Appraiser, he will presumably correct it. If he does not, he can be compelled to do so by mandamus. See State ex rel. Dofnos Corp. v. Lehman, 100 Fla. 1401, 131 So.333 (1930). In the alternative, the surface owner who pays the tax of the subsurface owner may assert an equitable lien against the latter's interest. See McPherson v. Redding, 323 So.2d 687 (Fla. 3d DCA 1976).

The testimony of other property appraisers indicates that few surface owners in those counties have requested separate assessment of subsurface rights. (MD-App. 2 et seq.)

the legally-assessed taxpayer may claim that he has been injured, at least to some small degree, by the increased millage which results from the omission or underassessment of other properties. Here, however, appellants' entire complaint is that some separately-owned subsurface rights in other counties are not separately assessed but are instead included with the surface interest in single, composite assessments. The entire injury resulting from that assessment error is sustained by the surface owner. Other taxpayers, such as appellants, suffer no injury whatsoever.

Appellants lack standing here because they have sustained no injury in fact, economic or otherwise. Data Processing Service v. Camp, 397 U.S. 150 (1970). As this Court said in Roberts & Schaefer

Co. v. Emmerson, 271 U.S. 50 (1926):

> "As this court has often held, one who challenges the validity of state taxation on the ground that it violates the equal protection clause, cannot rely on theoretical inequalities, or such as do not affect him, but must show that he is himself affected unfavorably by the discrimination of which he complains."

This Court also said in Valley Forge College v. Americans United, 454 U.S. 464 (1982), that a party who attacks a state statute must show

> "'. . . . not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'" (quoting Frothingham v. Mellon, 262 U.S. 447 (1923).

IV.

The judgment of the Florida Supreme Court rests on an adequate non-federal basis.

Appellants' lack of standing to complain of the assessment errors involved here and their lack of injury resulting from such errors, constitute an adequate non-federal basis for the judgment of the Florida Supreme Court. Under Florida law, taxpayers must prove that they have been injured to obtain judicial relief. West Virginia Hotel Corporation v. W.C. Foster Co., 101 Fla. 1147, 132 So. 842 (1931). The Florida Supreme Court applied this rule of Florida law in its judgment under attack here. It expressly held that the appellants "suffer no financial detriment whatsoever" because "The lack of such separate assessments merely means that the entire just

value is assessed against the surface owner." (App. 10a) That adjudication makes it unnecessary and inappropriate to decide any constitutional question.

V.

The appeal does not present a substantial federal question.

Appellants' case falls far short of meeting the strict requirements for demonstrating a violation of the equal protection clause of the 14th Amendment in local property taxation. Intentional and systematic underassessment of other property in the same class by state officials violates the right of equal protection of a taxpayer whose property is assessed at full value. Sunday Lake Iron Company v. Township of Wakefield, 247 U.S. 350 (1918); Cumberland Coal Company v. Board of Revision, 284 U.S. 23

(1931). The equal protection clause protects the taxpayer who is "singled out" for discriminatory treatment by an assessment at a higher level than other property in the same class. Township of Hillsborough v. Cromwell, 326 U.S. 620 (1946); Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1932). The good faith of state taxing officials is presumed, Sunday Lake Iron Company v. Township of Wakefield, supra, and the complaining taxpayer has the burden of establishing the unconstitutionality of his assessment. Charleston Federal Savings & Loan Association v. Alderson, 324 U.S. 182 (1945); Sunday Lake Iron Company v. Township of Wakefield, supra. He must show that any inequality is the result of intentional and systematic undervaluation and not mere mistakes or errors of judgment. Id. Unless it is

shown that under-evaluation was intentional and systematic, unequal assessments do not violate the equal protection clause. Southern Railway Company v. Watts, 260 U.S. 519 (1932).

Appellants do not meet these tests. The evidence falls far short of a showing of intentional and systematic discrimination throughout any taxing unit. Nor are appellants in any sense "singled out" for discriminatory treatment. Lack of statewide uniformity in property tax administration does not violate the equal protection clause where there is no showing of intentional and systematic discrimination. Southern Railway Company v. Watts, 260 U.S. 519 (1932); Hess v. Mullaney, 213 F.2d 635 (9th Cir. 1954), cert. den.

348 U.S. 836 (1954).[13]

Appellants also failed to prove any systematic underassessment of other properties.[14] That feature of this case makes it closely similar to Liggett Company v. Lee, 288 U.S. 517 (1939), in which Florida taxpayers complained of discriminatory administrative enforcement of an excise tax. Because an excise tax was involved, the Liggett case is similar to this one in that improper administration of the tax did not increase the plaintiff taxpayer's

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[13]The Watts and Hess cases, both of which involve alleged lack of statewide uniformity of tax administration, clearly refute the appellants' contentions here.

[14]Appellants acknowledged this in their motion for rehearing in the Supreme Court of Florida, in which they said, "The question of comparative inequality of assessed values is not even involved . . . . " (Emphasis in original.) (App. 65a)

tax. The rate of an excise tax is not increased by a lack of uniform enforcement. Moreover, mandamus provides a more effective remedy for the kind of clear legal error in tax administration that is involved in a failure to enforce an excise tax, than it does to remedy underassessment of other properties, for the latter kind of error involves the discretion of assessing officers.[15] In Liggett, this Court held that the appellants were not entitled to have their taxes cancelled because the tax was enforced against them but not against other taxpayers. The Court held that Florida law afforded appellants an adequate remedy in the form

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[15] Similarly, mandamus would clearly lie to compel a recalcitrant property appraiser to make separate assessments of subsurface rights which are shown to be separately-owned.

of a mandamus action. This Court said:

> "Under the law of Florida every unit of the taxpaying public has an interest in having all property subject to taxation legally assessed, and may in behalf of himself and others in like situation require that all property subject to taxation be placed on the tax books and bear its proportionate part of the expense of government. The appellants, if they deem the tax illegally omitted in certain cases, may apply for a writ of mandamus to compel the taxing officials to do their duty. State ex rel. Dofnos Corp. v. Lehman, 100 Fla. 1401, 131 So.333. Failure to collect the tax from some whose occupations fall within the provisions of the act, cannot excuse the appellants from paying what they owe. And certainly the remedy afforded by state law assures them equal treatment along with all others similarly situated."

The kind of imperfect local tax administration revealed here does not violate the 14th Amendment. States have large leeway where taxation is concerned and no specific right apart

from equal protection is imperiled. Lehnhausen v. Lakeshore Auto Parts, 410 U.S. 356 (1973). This Court has recognized that no scheme of taxation has been devised which is free of all discriminatory impact and that "the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause." San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 41 (1973). This Court has also rejected demands for absolute equality in state taxation which would require "error-free administration that even the best procedures could not guarantee." Rosewell v. LaSalle National Bank, Trustee, 450 U.S. 503 (1981). This Court recognizes that local taxation may be administered by local governmental units and that

the equal protection clause does not impose any "per se rule of 'territorial uniformity.'" San Antonio School District v. Rodriguez, supra at 55.

The cancellation of appellants' valid taxes would impair rather than enhance tax equality in Florida. Appellants have not demonstrated that any Florida property is omitted or undervalued; they have merely shown that some subsurface rights are not separately assessed. The judicial removal of appellant's properties from the tax roll would discriminate unfairly against other Florida taxpayers.

CONCLUSION

For the above reasons, the appeal should be dismissed or the judgment of

the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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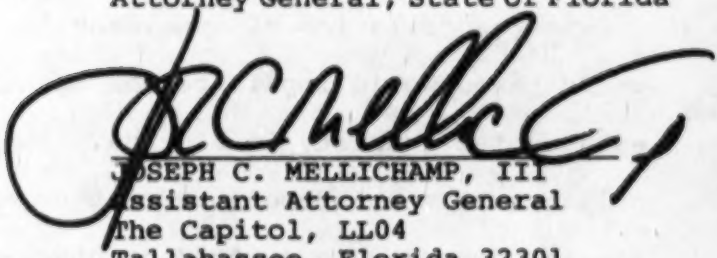

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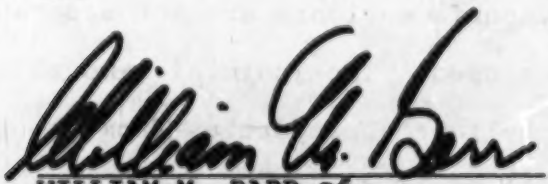

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APPENDIX

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1. Appellants' Prayer for Relief in Civil Action No. 75-4401-01 (R.8)

WHEREFORE, plaintiffs pray that this court will take jurisdiction of this cause and the parties thereto; that this court will find and decree that the said assessment of plaintiffs' property is unlawful and void both as to the assessment under the law and procedure followed and as to the valuation under all the circumstances; that the court will find and decree that the assessment violates the rights of the plaintiffs under the Florida Constitution and the Statutes of Florida as well as the Fourteenth Amendment of the Constitution of the United States; that alternatively the court declare the pertinent Florida Statutes to be unconstitutional and void; that the court will enjoin the

collection of taxes over and above the amount plaintiffs already have paid and will order the County of Volusia, Florida and the proper officials to refund the taxes paid under protest under said void assessment.

2. Excerpts from testimony of the following witnesses adduced at the trial held in Daytona Beach, Florida, on September 15, 1980:

a. Excerpts from testimony of FORD S. HOUSEMAN, Property Appraiser of Orange County, Florida.

(T. 173)

A. Very likely that there might be some mineral rights contained in the wording of old deeds, but they're not separate.

Q. Now, have you made any independent search to try to find such mineral rights if they exist?

A. No, sir, we have not. It's not required.

* * *

(T. 175-176)

Q. But I thought, sir, you told me that you did not search for the last ten

years to see if they had been severed.

A. That's exactly what I said.

I said they would have had to have been recorded or conveyed for us to find them as a separate deed or a separate entity.

Q. Do you know whether or not any of them were recorded as a separate entity in the last ten years?

A. They were not or we would have had them. We would have found them.

A. Did you make a search for them?

A. You don't have to make a search. They would have come through the regular process of all deeds.

Q. What is that process?

A. Each hard copy of every deed that's recorded in Orange County comes to our attention daily.

Q. All right. And so if Mr. Ford had purchased separate mineral rights in

Orange County within the last ten years, it's your testimony that you would have had to have caught it by the virtue of your system.

A. That's correct.

b. Excerpts from testimony of JOHN E. KNOWLES, Chief Appraiser in the office of the Property Appraiser of Seminole County, Florida.

(T. 177-178)

Q. Are you familiar with Section 193.481, Florida Statutes, pertaining to assessment of mineral rights?

A. Yes, I am.

Q. Can you tell me what is done in Seminole County towards the implementation of that statute?

A. If we are requested to do so, we separate the mineral rights from the fee.

Or if we become aware of a separation of the mineral rights from the fee, we do so without being requested.

* * *

(T. 178)

Q. Have you made a -- what efforts have you made, independent efforts, if

any, to uncover or search out mineral rights, privately held mineral rights, in Seminole County?

A. We have made almost no effort to discover this.

Q. Do you know how many parcels, roughly, you have on the tax rolls?

A. Yes. Only two at the present time.

* * *

(T. 184)

Q. All right. Is it your intention, sir, if you discover or are made aware of other mineral rights property in your community, in Seminole County, to also place it on the rolls?

A. Yes, sir.

c. Excerpts from testimony of RUDY MUCKENFUSS, Property Appraiser of Marion County, Florida.

(T. 190 - 191)

Q. How is that [Section 193.481] implemented in Marion County?

A. In Marion County we don't separate the mineral rights away from the rest of the property. They're all assessed together.

We have about four parcels that -- where people requested or filed returns on mineral rights, but we don't make any attempt to separate these mineral rights on the roll.

* * *

Q. And have any of those been acted upon by separate assessment of mineral rights?

A. No, sir.

We checked them out and we found

that the mineral rights that were being requested -- some of them overlapped with Deltona Corporation's large subdivision, and their property has already been cleared.

We have made no attempt or -- to go ahead and find out the total mineral rights in Marion County, who are the owners of the mineral rights.

Q. No search, then -- is that what you're telling me? -- to determine who owns mineral rights in Marion County.

A. We don't have the time or the personnel to go ahead and find out who the rightful owners of mineral rights are.

d. Excerpts from testimony of ED HAVILL, Property Appraiser of Lake County, Florida.

(T. 194-195)

Q. Are there separately held mineral rights that are assessed in Lake County?

A. Yes, there are.

Q. All right, sir. By what procedure do they become assessed on your rolls?

A. Basically the owner requests a mineral rights cutout, or someone comes in and claims the mineral rights and fills out a mineral rights form.

And we will assess the property separately for the mineral rights.

Q. Have you made any independent search of the titles of the county to determine outstanding mineral rights?

A. No, I haven't.

Q. Do you know whether it was done

before you took office?*

A. No, I don't.

* * *

(T. 195)

Q. Is the request by landowners the only method by which you have placed these minerals on the tax rolls?

A. Yes, sir. Or if they have been carried forward in years past, if it's been assessed in prior years, we'll just keep on assessing it until someone comes in and says it's been transferred or whatever.

It's basically a static situation in my county.

---

* Mr. Havill had held his office about three years, since January, 1977. (T. 194)

e. Excerpts from testimony of FRANK JOHNS, Assistant Property Appraiser of Brevard County, Florida.

(T. 203)

Q. Are there any separately held mineral rights that are taxed in Brevard County?

A. Yes, sir, there is.

Q. And do you know how many and what -- how many acres or what?

A. There's in excess of 400 acres assessed separately from the surface rights.

Q. All right, sir. What led to the assessment of those mineral rights?

A. Well, this came about several years ago on request of the parties that retained the mineral rights. And they contacted our office and asked that we create a tax bill for them on their ownership of the mineral rights reserved

in their deed.

* * *

(T. 206)

Q. Have you searched to find whether there are any independent sales or releases of mineral rights?

A. Yes, sir. No real in depth but to some degree here in the last few days.

Q. Since you and I talked on the phone?

A. Yes, sir.

Q. All right, sir. Did you find any?

A. No, sir.

* * *

(T. 220-221)

And -- however, if a deed comes through and it makes this point as to the reservation of these mineral rights, I instructed our personnel many months ago

to bring it to my attention and that we will comply with the statute.

But to do research on all the history of the chain of titles in Brevard County, I guess we're in the same position as many other counties are. It's just a personnel and time problem."

f. Excerpts from testimony of WILLIAM L. PRITCHETT, JR., Property Appraiser of Putnam County, Florida.

(T. 224)

Q. Have you ever done a search to determine whether there are any separately held mineral rights in Putnam County?

A. No, I haven't.

Q. Have you ever observed any deeds or conveyances that would indicate that there are such mineral rights?

A. I am aware that there are some separately held mineral rights in the county.

I would say that the transfer of mineral rights is a fairly rare occurrence in our county.

Q. Why have you not put the statute into effect? I mean 193.481 pertaining to taxation of mineral rights.

A. Frankly, since I was in a position

to do so, which was only since the first of February, there have been a number of other problems in the office, if you will, that seem to take a great deal more importance, number one.

Number two, I think that we would probably have some difficulty in placing a value on mineral rights within Putnam County because of the rarity of a transfer of ownership and -- which would make valuation a difficult process.

g. Excerpts from testimony of JOHN SEAY, Property Appraiser of Flagler County, Florida.

(T. 229-230)

Q. Are you familiar with Florida Statute 193.481 pertaining to the assessment of mineral rights?

A. Yes, sir.

Q. All right, sir.

Now, how is that implemented in Flagler County?

A. As I recall, the statute requires the property appraiser to separately assess subsurface ownership on mineral rights that are owned separate from the surface or the fee.

In Flagler County many subsurface owners -- or some subsurface owners have returned for taxation their subsurface ownership, which we have assessed. Others we have abstracted from public

records, which we have assessed.

Q. All right, sir. Have you made an independent search of the public records of Flagler County to determine that you have all the separately held mineral rights assessed?

A. No, sir.

Q. Have you considered doing that?

A. Yes.

Q. And was that when this statute came into effect, approximately?

A. Subsequent to the enactment of the statute I looked into it at some length.

I got -- I asked for prices from the abstract companies locally to determine the economic impact of the statute. And I couldn't get a price from any local abstract company to abstract the records for us.

I didn't have the staff to totally

abstract the records. Consequently, it wasn't done.

CERTIFICATE OF SERVICE

I DO CERTIFY that three (3) copies of the foregoing Motion to Dismiss or Affirm were furnished this 29th day of March, 1984, by mail, in accordance with Supreme Court Rule 28.3, to each of the following counsel, who represent all of the parties required to be served.

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Appellant's Reply Brief

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No. 83-1193

IN THE

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OCTOBER TERM, 1983

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Appellants,

v.

DEPARTMENT OF REVENUE, STATE OF FLORIDA, ETC., *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of Florida
(Alternative Petition for Certiorari)

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

STATEMENT

This Brief Opposing Motion to Dismiss or Affirm is furnished pursuant to Supreme Court Rule 16.5.

As to argument in Appellees' Statement concerning the evidence, this Court need only examine the findings of the trial Court and the opinions below. It was the Florida Supreme Court which said:

> "The district court opinion explored in detail the legislative provisions which outline the responsibilities of the Department of Revenue in regards to ad valorem taxation. We agree with the court's conclusion that the Florida Department of Revenue is clearly charged with implementing the legislature's intention that Florida's ad valorem taxation laws are enforced, implemented and administered uniformly throughout the state. § 195.027(1), Fla. Stat. (1981). Central to this duty is the Depart-

> ment's responsibility of supervising Florida property appraisers and other local taxation officials and ensuring that they comply with the laws which govern the assessment, collection and administration of ad valorem taxes. The evidence clearly supports the conclusion of both the trial judge and the district court that the Department had taken no serious or effective action to require all Florida property appraisers to comply with the requirement of section 193.481 to assess subsurface interests in or to real property. . . ."

The testimony quoted in MD-App. 3a-19a shows a failure of appraisers to perform mandatory duties and inferentially a failure of the Department to see that the duties are performed, in the face of other evidence which showed that there are huge acreages of separately owned mineral rights in those counties. Omitted testimony of the appraisers, with other evidence, also shows absence of uniformity in valuation by virtue of failure of the Department to establish criteria, "standards of value" which are "prima facie correct", as it is required to do pursuant to Section 195.032, Florida Statutes. (App. 87a). Appellants do not believe it necessary to quote testimony to this Court in view of the discussion of the valuation aspect of this cause by the trial court, and by the Fifth District Court of Appeal at App. 22a-25a. Particularly is this so because the Fifth District Court and the Florida Supreme Court, when there are separate assessments, both specifically spoke to the question of valuation at a level higher than the general level of assessment of substantially all other similar property in the taxing district. (Quotations at pages 7 and 8 of Jurisdictional Statement.)

The argument in Appellee's Statement, concerning requests for separate assessment, is a smokescreen. Florida previously has decided that the duty to perform the function of assessment cannot be hinged upon the requests of surface owners that separately held mineral rights be

assessed separately, that history of the law having been summarized in the opinion of the Fifth District Court of Appeal. See also *Cassady v. Consolidated Naval Stores Company*, 119 So.2d 35 (Fla. 1960).

ARGUMENT

(Numbered to correspond to arguments in the Motion)

I

The argument on pp. 13 and 14 of the Motion To Dismiss Or Affirm shows why this Court has plenary jurisdiction. The Supreme Court of Florida *did* exert its jurisdiction in such a way that the cause could have been brought here had the question been raised prior to the Florida Supreme Court's opinion. The cause was *not* remanded to the Fifth District Court for further consideration of questions that had not been decided at that level.

Appellants won their case in the Fifth District Court of Appeal of Florida. That judgment was *not* appealable to the Florida Supreme Court, and the Florida Supreme Court only considered the cause on an application for review. See App. 75a for the Order of the Supreme Court of Florida, dated December 29, 1982, construing the Notice of Appeal, which had been filed by the Department of Revenue, as an application for review. The appellants here were free to argue, as Respondents in the Supreme Court of Florida, that the District Court judgment was correct on grounds other than as stated by the District Court; but constitutional invalidity of Section 194.192(2), Florida Statutes, as to personal judgments, furnished no basis for arguing that the District Court was correct in holding that the *assessments were void*.

It is true that Florida does not permit matters to be raised for the first time in a Motion For Rehearing. Thus the taxpayers were trapped by the Florida Supreme Court judgment which ordered reinstatement of the per-

sonal judgments and by procedure which does not permit new questions to be raised on application for rehearing. Rehearing was denied without opinion.

As conceded in the Jurisdictional Statement, the Appellants' equal protection arguments on this narrow issue were minimal, but not totally lacking, particularly in view of their major reliance throughout this litigation on the bastion of Fourteenth Amendment equal protection.

II

This Court, in *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981), sharply divided, held that Illinois could require, as the sole remedy, the payment of disputed taxes and a claim for refund. That procedure, however, is not the plain, speedy, and efficient statutory remedy which has been provided by Sections 194.171 and 194.181, Florida Statutes.

Florida cases do not show that Florida taxpayers have entirely optional methods of proceeding. The argument on p. 16 of the Motion To Dismiss Or Affirm, pertaining to Florida law, is not sustained by the cases there cited.

Willig v. Blake, 358 So.2d 871 (Fla. 3d DCA 1978) shows that Section 194.171, Florida Statutes, establishes the procedure whereby a taxpayer, upon suing to contest his assessment, need pay only the amount admitted in good faith to be owed. The taxpayer in that case filed his suit on the same day he paid the full amount of the tax without protest, which subjected the taxpayer to summary judgment.

The case of *Smith v. University Presbyterian Homes, Inc.*, 390 So.2d 79 (Fla. 2d DCA 1980), approved by the Supreme Court of Florida at 408 So.2d 1039, stands for the proposition that if a taxpayer's suit results in a judgment for a refund, the taxpayer is not entitled to pre-judgment interest.

The sixty-day provision of Section 194.171(2), Florida Statutes, is jurisdictional, and not a statute of limita-

tions. See *Department of Revenue v. Goembel*, 382 So.2d 783 (Fla. 5th DCA 1980), particularly headnotes 3 and 4.

There is some law in Florida indicating that the limitation period does not apply where assessments are charged to be unauthorized and void. See, for instance, *Hansen v. Port Everglades Steel Corporation*, 155 So.2d 387 (Fla. 2d DCA 1963), where a distinction was made between property immune from taxation and taxable but exempt property. See also *Overstreet v. Ty-Tan, Inc.*, 48 So.2d 158 (Fla. 1950), concerning property which was not subject to taxation, where the court referred to taxes "devoid of any legal basis". These cases do not provide unlimited options of attack. These cases do not govern all, if any, of the claims made by the taxpayers.

The claims in the cases before this Court ranged from the contention that the assessments were bad because the assessor failed to follow statutory criteria of Section 193.011, Florida Statutes, and claims under the Florida "greenbelt" law, Section 193.461, Florida Statutes, to contentions that Section 193.481 was void under Florida law, and to further contention that the assessments were void under the Fourteenth Amendment. The taxpayers properly joined all their claims in different counts in the same litigation and in fact paid an amount of taxes they admitted as due.

Waiver is generally described as the intentional relinquishment of a known right. No intentional waiver is shown. The question of unreasonable classification inherent within Section 194.192(2) with regard to imposition of personal judgments, as statutory penalization for assertion of one's rights, remains.

III

The argument of Appellees fails to discern that the surface owners in other counties, who are wrongfully taxed on separately held mineral rights which they do

not own, are not in the same class of taxpayers as are the Appellants here. Rather, it is the owners of separately held mineral rights in those counties who are in the same class as the appellants.

Appellee's Argument III overlooks the fact that Question II of the Jurisdictional Statement addresses both the omission to tax others and taxation at different, arbitrary levels of assessment. The injury to appellants lies in the fact that they are taxed, while others in their class are given a free ride or taxed at a lower level of assessment in other counties within the taxing district.

Unequal application of a valid state law may deny equal protection. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886); and *Zeigler v. Jackson*, 638 F.2d 776 (5th Cir. 1981). The state may not arbitrarily choose to enforce its laws against some and not others of the same class.

Perhaps it is true that surface owners in other counties could attack their own assessments. It is perfectly obvious that the owners of separately held subsurface interests in other counties, who are given the free ride, will not bring suit to force the taxing authorities to bring them under the blanket of taxation. The failure of others to bring suit to attack their assessments, or to subject themselves to taxation, cannot serve to deprive appellants here of constitutional protection nor of standing to assert their rights.

Further, old Florida cases dealing with mandamus are suspect. As pointed out on page 16 of the Jurisdictional Statement, the Florida Supreme Court, in the decision sought to be reviewed, extended the application of the case of *Straughn v. GAC Properties, Inc.*, 360 So.2d 385 (Fla. 1978). In that case, the Florida Supreme Court had held that a taxpayer has no cause of action against the Department of Revenue to compel equalization of ad valorem tax valuations. Now the Florida Supreme Court

has said that the Appellants here have no cause of action to compel compliance with the law where taxing authorities in other counties utterly refuse to tax separately held subsurface interests, or tax on lower levels of assessment. See App. 9A for this holding by the Florida Supreme Court. *The burden of seeing that the Department performs its duty is not on appellants anyway.*

Florida Statutes, Sections 194.171 and 194.181 provide a remedy for contesting assessments, which appellants did. The Florida Supreme Court did not rule that the appellants lacked standing.

IV

The plain, speedy and efficient remedy envisioned in 28 U.S.C. § 1341 requires that federal rights as to assessments first be considered by state courts and preserved. Preserved for what, except this United States Supreme Court? Procedural requirements, and prudence, dictate that state and federal claims all be asserted in the litigation.

The trial court made a direct holding that there was no Fourteenth Amendment violation. The Supreme Court of Florida approved that holding; so there is a direct ruling on the question, notwithstanding the Supreme Court of Florida did not mention federal rights.

State power affords no basis for denial of federal rights by clothing the denial in the guise of state law, or in silence. Such approach would sound the death knell for federal rights. Constitutional rights of a taxpayer are denied as well by refusal of a state court to decide a question as by erroneous decision of it, the discriminatory assessments in either case being left intact. See *Lawrence v. State Tax Commission*, 286 U.S. 276, 282, 283. The decision below is inconsistent with the asserted federal rights.

Where a non-federal ground is interwoven with the federal rights so as not to be independent, then this

court's jurisdiction is plain. *Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co.*, 243 U.S. 157, 164. To be adequate, a state law ground must be broad enough to sustain the judgment without regard to the federal rights. That is the antithesis of what we have here, where a reversal as to the federal rights asserted would require reversal of the judgment sought to be reviewed.

V

The argument that there is no substantial federal question is frivolous. The Department disparaged Fourteenth Amendment rights, in its brief before the Supreme Court of Florida, as a "massive brouhaha"; but Fourteenth Amendment rights should not be treated so cavalierly.

The trial court determined that through the failures of the Department, identically situated taxpayers in other counties within the District were deliberately and systematically omitted from taxation. The trial court considered the lack of assessment criteria. The district court reversed the trial court on his own findings of fact in a holding which covered both aspects of Appellants' question II—that is, the omission to tax others similarly situated and also different levels of assessment, where such others are taxed. The Supreme Court of Florida also spoke to both aspects of Appellants' question II in the opinion which reversed the district court and ordered reinstatement of the trial court judgment.

The appellants in these causes not only have complained of the fact others similarly situated are not taxed, but vigorously have complained of the fact that the failure of the Department to establish valuation criteria pursuant to statute has resulted in a want of uniformity of assessment where there is taxation of separately held mineral rights. This aspect of question II is stated on page ii of the Jurisdictional Statement and in the middle paragraph of page 15 of the Jurisdictional

Statement. A failure to establish standards of value is not the same question as valuation discretion under those standards. All three courts below ruled that the Department has failed to perform its duties under Florida law.

There is a three judge federal district court case from the State of Alabama which bears some similarity to the present case. That is the case of *Weissinger v. Boswell*, 330 F.Supp. 615 (D.C. Ala. 1971), which examined a Fourteenth Amendment claim, beginning at page 621 of the Reporter. The case involved a disparity in assessments where the lack of uniformity had resulted from the intentional and systematic refusal of the Commissioner of Revenue of Alabama (somewhat analogous to the Department of Revenue of Florida), to perform his duties in accordance with state law. It was held that there resulted a Fourteenth Amendment violation.

Many of the cases cited by Appellees under their Argument V were cited and relied upon by the Appellants in the Jurisdictional Statement. They conclusively show that a taxpayer's right to Fourteenth Amendment equal protection presents a substantial federal question.

CONCLUSION

Respectfully, the Motion to Dismiss or Affirm should be denied.

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